

October 12, 2015

Via electronic email: CEQA.Guidelines@resources.ca.gov

Christopher Calfee
Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Dear Mr. Calfee,

The staff of the South Coast Air Quality Management District (SCAQMD) appreciates the opportunity to provide input on the preliminary discussion draft of the proposed updates to the 2015 CEQA Guidelines. The SCAQMD has extensive experience with CEQA through our varying responsibilities as a commenting agency, a responsible agency and as a lead agency for our own rule development process and for any discretionary permits we may issue. Drawing from this experience, we have comments on the following specific topics. Please note that additional language appear in italics, while deletions appear as strikeouts.

1) Updating the Environmental Checklist-Air Quality (Pg. 53):

- a. We support the changes to Air Quality section III a) because it promotes the use of consistent and verifiable standards.
- b. We are concerned with the changes to Air Quality section III e) because it will result in inconsistencies between CEQA and the Health and Safety Code.

Proposed Change: “Result in ~~frequent and~~ substantial emissions (such as odors, dust or haze) ~~for a substantial duration~~ that adversely affect a ~~substantial~~ *considerable* number of people?”

Reasoning: The Health and Safety Code section 41700- generally used to prohibit nuisances created by odor and fugitive dust, etc.- does not include time-based criteria, such as frequency or duration. Furthermore, the terms “frequency” and “duration” are not defined here. Since the SCAQMD and other air districts are often called upon to enforce these types of violations, it would be far simpler for the air districts to enforce a consistent standard similar to the Health and Safety Code.

2) Updating the Environmental Checklist-Energy (Pg. 56):

- a. Please consider expanding Energy section V a) to include instances where an energy resource is wasted because the gas by-product is flared instead of converted to usable energy through reasonably available means.

Proposed Change: “Result in wasteful, inefficient, or unnecessary consumption of energy, *or unnecessary waste of energy resources*, during project construction or operation?”

Reasoning: The SCAQMD often comes across facilities that produce substantial quantities of gas as a by-product of other activities (i.e., oil production, refining). Flaring that produced gas, instead of making beneficial use of it is also a waste of an energy resource and undermines goals towards reducing GHG impacts. Beneficial use includes activities such as the use of microturbines, gas re-injection and gas sales. A clear threshold question to address this type of energy wastage would facilitate efforts to make beneficial use of by-product gas, where possible.

- b. We are concerned that Energy section V b) is unclear as a significance threshold.

Proposed Change: “*Hinder or impair the ability to reach energy efficiency goals of SB 350 (Ch. 547, 2015, DeLeon) or other state or local plans for the promotion of renewable energy or energy efficiency.*”

Reasoning: We believe the proposed language is more consistent with the way thresholds of significance are generally written. The current language does not make sense as a threshold question.

3) Remedies and Remand (Pg. 73):

- a. We are concerned that proposed section 15234(a)(3) could be interpreted as going beyond Public Resources Code section 21168.9(c) by authorizing the Court to direct a lead agency to take specific action to come into compliance with CEQA.

Proposed Change: “take specific action *the public agency determines is* necessary to bring the agency’s consideration of the project into compliance with CEQA.”

Reasoning: The proposed change makes clear the public agency, and not the court, determines the specific action necessary to bring the agency’s consideration of the project into compliance with CEQA.

4) Analysis of Energy Impacts (Pg. 78):

- a. Similar to our comment on the energy section of the Environmental Checklist, we ask that Section 15126.2(b) be modified to include the unnecessary wastage of an energy resource, even when not being consumed.
 - b. **Proposed Change:** “Energy Impacts. The EIR shall include an analysis of whether the project will result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy, *or unnecessary waste of energy resources*. This analysis should include the project’s energy use *or waste* for all project phases and components, including transportation-related energy, during construction and operation. In addition to project design, other relevant considerations may include, among others, the project’s site, location, orientation, equipment use and any renewable energy features that could be incorporated into the project...This analysis is subject to the rule of reason and shall focus on energy demand *or wastage* that is caused by the project.”
 - c. **Reasoning:** Please see number 2 a) above.
- 5) Baseline (Pg. 94):
- a. The proposed changes to section 15125 are intended to align the section with general principles regarding who can generally demonstrate whether substantial evidence exists or not and to clarify that section (a)(3) applies to existing conditions baselines only.
 - b. **Proposed Change:**

Section 15125(a)(2): “If *substantial evidence* ~~a lead agency demonstrates with substantial evidence~~ that use of existing conditions would be either misleading or without informative value to decision-makers and the public, ~~it may use a~~ *different baseline should be used*. Use of projected future conditions must be supported by reliable projections based on substantial evidence in the record.”

Section 15125(a)(3): “*When using an existing conditions baseline, a* ~~A~~ *lead* agency may not rely on hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.”
 - c. **Reasoning:** The current proposed changes to Section 15125(a)(2), may be interpreted to mean that only the lead agency can demonstrate that substantial evidence supports the use of a future conditions baseline only. However, the SCAQMD is not aware of any instance in CEQA where the lead agency is afforded unfettered discretion to determine whether substantial evidence exists. In other words, consistent with CEQA, the public should be able to comment if substantial evidence exists to support the use of a future conditions baseline because the existing conditions baseline is misleading or without informative

value to decision-makers. An accurate baseline is an essential prerequisite to a legally adequate environmental review. Without it, “analysis of impacts, mitigation measures, and project alternatives becomes impossible” and informed decision-making cannot occur. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 953-955. The public should not be left out of providing input on this very important issue.

The proposed addition to section 15125(a)(3) makes clear that the prohibition against the use of hypothetical conditions that have not been achieved in practice, applies only when using the existing conditions baseline. The existing conditions baseline is the scenario that was discussed in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal4th 310, 322. Otherwise, as currently drafted, section 15125(a)(3) renders the discussion on the use of future conditions in section 15125(a)(2) meaningless because the future conditions will never have actually been achieved in practice yet.

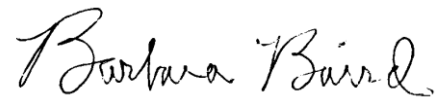
6) Deferral of Mitigation Details (Pg. 98):

- a. The SCAQMD is supportive of the new proposed language but asks that section 15126.4(a)(1)(B)(3) be broadened slightly to include the idea that there may be other, more effective measures that may be available in the future.
- b. **Proposed Change:** “lists ~~the~~ mitigation options to be considered, analyzed and possibly incorporated in the mitigation plan...”
- c. **Reasoning:** There are many instances where the precise formulation of mitigation that will be incorporated into the project in the future, will change as technology evolves, or other circumstances change. By deleting “the” from the draft language, the lead agency can consider variations to the measure that better meet the needs of the project and advance the latest feasible technological standards without being concerned that that particular variation of the measure was not analyzed in the environmental document. Of course, the measure must still meet the performance standards.

Again, the SCAQMD staff thanks your agency for the opportunity to provide comments on this important topic and looks forward to working with you as the process continues to develop. If you have any questions or seek clarification on the suggestions raised in this letter, please contact me at (909) 396-2302 or bbaird@aqmd.gov.

Respectfully submitted,

Christopher Calfee
October 12, 2015
Page 5

A handwritten signature in black ink that reads "Barbara Baird". The script is cursive and fluid, with the first name and last name clearly distinguishable.

Barbara Baird
Chief Deputy Counsel

BB/VT/IM